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No. 2016
RESTRICTED

AMERICAN EMBASSY
London, December 23, 1949

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SUBJECT: Immunity of Foreign States, their Agencies, Naval Vessels, Merchant Vessels and other Public Property from the Process of the Courts and from Taxation

The Honorable
The Secretary of State,
Washington, D. C.

Sir:

I have the honor to refer to the Department's circular airgram of November 1, 1948, 8.15 a.m., entitled SOVEREIGN IMMUNITY and to transmit herewith a copy of a memorandum which has been received from the Foreign Office on the subject. In forwarding this information the Foreign Office regretted that it had not been possible to send it earlier, but that quite a lot of research had been necessary to enable an Assistant Legal Adviser of the Department of Research to prepare the study. It was stated further:

> "It does not purport to be a complete treatment of the subject and still less an official statement of the position by the Foreign Office. It possesses no more authority than a quotation from any legal text book on the subject or an opinion which might have been given at the request of the United States Embassy solicitors by any practising member of the Bar."

Respectfully yours,
For the Chargé d'Affaires ad interim:

John W. Bailey, Jr.,
American Consul General

Enclosure:
Memorandum, entitled as above

JWBailey Jr/mos
(Forwarded in multilith process)

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Enclosure No. 1 with RESTRICTED Despatch 2016,
December 23, 1949 from the Embassy at London

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IMMUNITY OF FOREIGN STATES, THEIR AGENCIES, NAVAL VESSELS, MERCHANT VESSELS AND OTHER PUBLIC PROPERTY FROM THE PROCESS OF THE COURTS AND FROM TAXATION.

1. Jurisdictional Immunity

There are two propositions of international law which have been engrafted into English law and which have recently been described in the English Courts (1) as "well established" and "beyond dispute".

These are:-

(1) That the courts of a country will not implead a foreign sovereign, i.e. they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

(2) That the courts of a country will not by their process, whether the foreign sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

Although there is some difference in the practice of nations as to whether these principles extend to property only used for the commercial purposes of the sovereign or to personal private property, the English Courts have consistently held that they apply to both these kinds of property.

The proposition that no action or other proceedings can be taken in the English Courts against a foreign sovereign unless he voluntarily submits to the jurisdiction is illustrated by a series of cases extending over the last hundred years. In the earlier cases immunity was claimed on behalf of the ruler of a foreign State, but the principles established in those cases have been applied in later cases where immunity has been claimed not on behalf of the ruler of a State in person but on behalf of the State itself or its Government. In certain cases, such as Mighell v. Sultan of Johore and Duff Development Company v. Government of Kelantan which are referred to below, a person or administration has been regarded internally as a foreign sovereign in the English Courts, although from the general standpoint of international law such person or administration was neither foreign or sovereign.

One of the earliest cases illustrating this principle of immunity was Duke of Brunswick v. King of Hanover (2) in which/

(1) Lord Atkin, in The Cristina (1938) A.C., p.490
(2) (1848) 2.H.L.C.I.

which it was held that the English Courts had no jurisdiction to entertain an action for the recovery of debts incurred by a foreign sovereign whilst on a visit to England. The decision in this case was followed in Wadsworth v. Queen of Spain(3) but in the latter case the opinion was expressed by Lord Campbell that a sovereign who was a defendant might be subject to the jurisdiction in respect of acts done otherwise than in his character as a sovereign. However, in Mighell v. Sultan of Johore(4) which reaffirmed the principle that the English Courts had no jurisdiction over an independent foreign sovereign unless he submitted to the jurisdiction, it was also held that the fact that a foreign Sovereign had entered into a contract in a foreign country as a private individual did not amount to a submission to the jurisdiction or render him liable to be sued for breach of such contract. This case, in fact, established the principle that the English Courts will decline to make any distinction, where jurisdictional immunity is concerned, between the private and public acts of a sovereign, and, therefore, do not admit of any distinction between the sovereign and non-sovereign acts of a foreign State or Government.

Immunity from proceedings(5) is, therefore, recognized in all cases except:-

(a) where there has been voluntary submission,

or (b) where the foreign sovereign, having itself initiated the proceedings, a counter claim in the nature of a set-off is raised by way of defence.(6)

or (c) where an international Convention makes a High Contracting Party liable to legal proceedings in the courts of a foreign State, and His Majesty has, by Order in Council, certified that, for the purpose of any proceedings brought in the Supreme Court against that party or in respect of property of that party in accordance with the provisions of the Convention, that party shall be deemed to have submitted to the jurisdiction of the Court (Section 13 of the Administration of Justice (Miscellaneous Provisions) Act, 1938.)

The only other possible exception to the jurisdictional immunity of a foreign sovereign is the case of proceedings against a foreign sovereign regarding title to real property in England, other than property, such as Embassy premises,

necessary/

(3) 17 Q.B. 171
(4) (1894) 1 Q.B. (C.A.) 149
(5) For a general consideration of this question see Fitzmaurice, B.Y.B.I.L. 1933 p.104;
(6) (S.A.Republic v. Compagnie Franco-Belge (1898) 1 Ch.190

necessary for the exercise of the sovereign functions of the foreign State concerned, but it is not possible to speak with any certainty on this point as no such case appears ever to have come before the English Courts.

There are several cases illustrating the strictness with which the English Courts have safeguarded a voluntary submission to the jurisdiction by a foreign sovereign. In Duff Development Company v. Government of Kelantan(7), it was held that nothing short of an actual submission in respect of the particular proceedings before the Court will suffice to give the Court jurisdiction. The fact that a foreign State or Government has in a private contract agreed to submit a dispute to the English Courts does not amount to an actual submission, and does not give the courts jurisdiction. Nor does the fact that a foreign Government has assented to the jurisdiction of the Court for the purpose of a decision on a matter in dispute, enable execution to be levied against property of that Government as the result of a judgment against it. In Compania Mercantil Argentina v. U.S. Shipping Board(8), it was held that a mere submission to arbitration does not amount to a waiver of the immunity of the sovereign when sued in a Court of Law in personam. Further, it was established in Vavasseur v. Krupp(9), that, even if there is submission to the jurisdiction it does not follow that the rights of a foreign sovereign as to non-interference with its property can be infringed. It is, however important to notice that the mere fact that a foreign sovereign is interested in the subject matter of a case before the English courts is not sufficient to cause the court to decline jurisdiction. It has been held for example that the fact that a foreign Government is, or may be interested in a trust or similar fund is not a sufficient reason why the Court should decline jurisdiction. (In re Russian Bank for Foreign Trade)(10) and that a mere claim by a foreign State, which is neither an actual nor a necessary party to the proceedings, that it has an interest in the case will not prevent the Court from adjucating the action or between the parties to it (Haile Selassie v. Cable and Wireless Ltd (No. 1) (11).

The principle maintained by the English Courts that the property of one sovereign is not subject to seizure or arrest in the territories of another, is also illustrated by a long series of cases. It was early recognised that an armed vessel belonging to a foreign sovereign could not be/

(7) (1924) A.C.797
(8) (1924) 40 T.L.R.
(9) 9 Ch. 351
(10) (1933) Ch. D.745
(11) (1938) Ch. D. 545

be seized or arrested(12) and it soon came to be recognised that unarmed vessels enjoyed the same immunity;(13) and that the fact that a public vessel was carrying cargo did not deprive such vessel of the immunity.(14)

The principle of the immunity of all State vessels was upheld and extended in the case of The Parlement Belge(15) in which it was held that an unarmed packet belonging to the sovereign of a foreign State, and in the hands of officers commissioned by him, and employed in carrying mails, was not liable to be seized in a suit in rem. to recover redress for a collision, and that this immunity was not lost by reason of the vessels also carrying merchandise and passengers for hire.

The decision in The Parlement Belge definitively established the following four points:-(16)

(i) that the immunity is not confined to ships of war, but extends to other public ships the property of any Sovereign State which are "destined for public use";

(ii) that the immunity protects the foreign sovereign not merely against process in personam, but also against the process in rem. of the English Court of Admiralty;

(iii) that the declaration by a foreign State that a ship is a public vessel of the State is conclusive upon an English Court and cannot be enquired into;

(iv) that the mere fact of the ship being used subordinately and partially for trading purposes did not take away the general immunity.

The decision in The Parlement Belge was upheld in The Jassy(17) and has been followed, and its underlying principles extended, in a number of later cases. In The Porto Alexandre(18) it was held that a vessel owned or requisitioned by a sovereign independent State and carrying freight for the State is not deprived of immunity from the process of arrest by reason of the fact that the vessel is employed on ordinary trading voyages carrying cargoes for private individuals. In the Compania Mercantil Argentina v U.S. Shipping Board(19) it was held that the mere fact that a ship belonging to a sovereign body is exclusively used in private trading does not render the sovereign body liable to process in the English Courts.

It/

(12) The Prins Frederik (1820) 2 Dods. 451
(13) The Thomas Scott (1804) 10 L.T.720
(14) The Constitution 4 P.D.39
(15) (1880) 5 P.D. (CA 197)
(16) McNair B.Y.B.I.L. 1921-22 pp. 68-69
(17) (1906) P.D.270
(18) (1920) P.30
(19) (1924) 40 T.L.R.

It has further been held in a number of cases that a maritime lien is not enforceable against a vessel which is the property of a foreign state; or against vessels chartered or requisitioned by a foreign State, or otherwise in its possession and control, as long as the latter vessels remain subject to the possession and control of the foreign State. In The Constitution(20) it was held that a maritime lien in respect of salvage was not enforceable against a foreign ship of war. In The Tervaete(21) it was held that a maritime lien cannot attach, even in suspense, to a State-owned foreign vessel so as to be enforceable against it if and when it is transferred into private ownership. The Sylvan Arrow(22) decided that no maritime lien attached to a vessel requisitioned by a foreign sovereign which became involved in a collision as long as the vessel remained subject to governmental possession and control. The slightly later case of the Meandros(23) was distinguished from the Sylvan Arrow because salvage proceedings in rem were in the latter case instituted after the requisition was terminated and the vessel had been restored to its original owner and it was held that when governmental possession and control cease to operate and the vessel is redelivered to its owner, an action in personam will lie against the owner in respect of salvage services rendered to the vessel whilst under such control if he has derived a benefit from such services.

It can be seen from the cases briefly summarised here that the principle that the English Courts will not exercise jurisdiction over a ship which is the property of a foreign State (whether such vessel is actually engaged in the public service or is being used in the ordinary way of a shipowners business) and that a maritime lien cannot attach to such a vessel, has been extended to ships which are not the property of a foreign State, but are chartered or requisitioned by it or otherwise in its possession or control.(24) The English Courts have, therefore, adhered strictly to the practice of not withholding jurisdictional immunities from States even where such ships have been engaged in commerce. The United Kingdom, it is worthy of note, signed both the Brussels Convention of 10th April, 1926, which recognizes the principle that ships (with their cargoes) operated or owned by Governments for commercial purposes, shall in time of peace not enjoy jurisdictional immunity, and the supplementary Protocol of 24th May, 1934, but did not ratify either the Convention or the Protocol.

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(20) (1879) 4 P.D.39
(21) (1922) P.259
(22) (1923) P. 220
(23) (1925) P. 61
(24) Oppenheim International Law (7th Ed.) Volume I 767-768. The extension of immunity to ships not actually owned by a foreign State is illustrated, in addition to the cases already cited, by The Messicano (1916) 32 T.L.R. 519: The Erissos (1917) LL.R. October 23; The Crimdon (1918) 35 TLR.81.

In The Cristina(25) doubts were expressed as to whether the decision in The Porto Alexandre(26) had been a correct one and whether, therefore, jurisdictional immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages. It was held by the House of Lords, however, that to allow the arrest of a ship, including a trading ship, which is in the possession of, and which has been requisitioned for public purposes by a foreign sovereign State would be an infraction of the rule "well established in international law" that a sovereign State cannot, directly or indirectly, be impleaded without its consent.

A very recent case reaffirming the principles which have been referred to above is Dollfuss Mieg v. Bank of England(27) in which the Bank successfully moved to set aside the writ and all subsequent proceedings on the ground that 64 gold bars, which were the subject matter of the action, were in the possession of or under control of the Governments of the U.S.A., France and the U.K., and that the action therefore impleaded two foreign sovereign States.

The principle that a foreign sovereign State cannot, either directly or indirectly, be impleaded without its consent carries with it the consequence that departments of a foreign Government and agents of a foreign Government, as well as the Government itself, are at the present time recognised as enjoying jurisdictional immunity under English law.

(a) Immunity of a department of a foreign Government.

In Compania Mercantil Argentina v. U.S. Shipping Board the defendants, who owned a large mercantile fleet, produced a certificate furnished by the U.S. Ambassador stating that they were a "Department of State of the U.S.A." and successfully claimed immunity on the ground that they were a sovereign body, being a Department of the U.S.A. and therefore could not be sued in the English Courts.

The decision in Compania Mercantile Argentina v. U.S. Shipping Board has been followed very recently in Krajina v. The Tass Agency, which was heard in the Court of Appeal on 27th June 1949. In that case the Soviet Ambassador furnished a certificate that the Tass Agency "constitutes a department of the Soviet State i.e. the U.S.S.R.

exercising/

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(25) (1938) A.C. 485
(26) (1920) P.20
(27) Reported in "The Times" on 7th April, 1949
(28) (1924) 40 T.L.R.

exercising the rights of a legal entity." The Court held that, in the light of the Ambassador's certificate, they were bound to come to the conclusion that the Tass Agency was a department of the Soviet State, and therefore decided that its claim to immunity must be upheld. An attempt was made to distinguish this case from the case of the U.S. Shipping Board on the ground that the Tass Agency had been declared to be a "legal entity" and that the U.S. Shipping Board was merely a department of the Government and had no separate legal existence. The Court was not satisfied, on the evidence available, that the Tass Agency was a separate legal entity, and made it clear, that even if it had been, it would not necessarily have been deprived of immunity for that reason. In each case it would be for consideration whether a State Agency or department was so incorporated as to make it a legal entity separate from the State and equivalent to an ordinary trading enterprise.(29)

(b) Immunity of Agents of a foreign Government

In Twycross v. Dreyfus(30) it was decided that proceedings could not be brought in the English Courts against the agent of a foreign Government in respect of property which, or an interest in which, the agent had acquired on behalf of such foreign Government. The Court declined to treat such property, because it was in the hands of an agent, as being anything other than the property of the Government itself and said "you cannot sue the Peruvian Government and it would be a monstrous userpation of jurisdiction to sue a foreign Government indirectly by making its agents in this country defendants."

The English Courts will extend to agents of a foreign Government immunity in respect of property which they lived(sic) or in which they have acquired an interest, on behalf of the foreign Government, and in respect of all acts which are performed in the capacity of agent. Unless such agent has diplomatic status, the English Courts will not grant him unconditional immunity. This is illustrated by Fenton Textile Association v. Krassin(31) where a claim to immunity by a trade agent of the U.S.S.R. on the ground that he was an authorised representative of a foreign State and as such was entitled to unconditional immunity from process was not upheld. (The Trade Agreement of 16th March, 1921, between the United Kingdom and the U.S.S.R., which was applicable, provided that official agents thereunder should be immune from arrest and search, but did

not

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(29) The decision in the Tass Agency case has led H.M.G. to set up an inter departmental Committee to consider and report in the general question of the immunity afforded by English Law to organs of foreign States (see Part III of this Memorandum)
(30) (1877) 5 Ch. 605
(31) (1922) 38 T.L.R.259

not provide for immunity from civil process other than as agent.) Theimmunity of a foreign Government in respect of transactions carried out by its agent, and in respect of any of its property dealt with by such agent, may, of course, be waived. (See for example, Article 2 (6) (7) of the Temporary Commercial Agreement of 16th April, 1930, between the United Kingdom and the U.S.S.R.(32)

The case of Fenton Textile Association v. Krassin, which has been referred to above, illustrates another point of interest. This is that provisional recognition of a new State or Government or sovereign carries with it the same jurisdictional immunities as those accorded in the event of de jure recognition. If, however, H.M.G. has not recognised a foreign Government or its sovereignty, the Courts of this country cannot, or at least ought not to, recognize such government or its sovereignty (Luther v. Sagor)(33). If the Court has insufficient knowledge as to the sovereignty of a person, Government or State, it must apply for information to the Secretary of State for Foreign Affairs.(34) The answer given by the Secretary of State is final and conclusive; the Court cannot go behind the certificate of the Secretary of State nor permit the parties to adduce evidence contrary to the information given in it. Luther v. Sagor affords a good illustration of the principles outlined above; in that case the Court of Appeal reversed the judgment of the Court below on a certificate being given by the Secretary of State that the Soviet administration was recognised by H.M.G. as being in possession of the power of a sovereign in Russia.

The same considerations apply when two contending bodies each claim to be the sovereign Government of a foreign country (e.g. in Spain during the civil war which began in 1936). Here it may happen that one Government is recognised as the de jure Government of the whole of the country, but another Government as the de facto Government of certain areas in which a revolution has succeeded. In such cases also the Secretary of State's certificate is conclusive. (See Banco de Bilbao v. Rey:(35) Government of Republic of Spain v. Arantzazu Mendi)(36)

II. Immunity from Taxation

The United Kingdom has maintained as against foreign Governments the doctrine that one Government may not tax another and has followed this doctrine in its own practice. It bases this doctrine on the principle of the sovereignty and equality of States which lies behind the rule of international law that the public property of a State is immune from the jurisdiction of another State.

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(32) Treaty Series No. 19 (1930)
(33) (1921) 1 K.B.450
(34) See Lyons "The Conclusiveness of the Foreign Office Certificate" B.Y.B.I.L. 1946 pp.245-253.
(35) (1938) 2 K.B. (CA) 176
(36) (1939) A.C.256

A recent example of the practice of the United Kingdom is to be found in the case of the Iraq Currency Board which was set up for the purpose of issuing currency and coin, and which has been treated in the United Kingdom as a foreign Government institution and as such exempt from taxation.

There is an absence of decisions by the English Courts bearing on this subject but the administrative decisions by which British practice is regulated were based on a consideration of those principles of international law on which the jurisdictional immunities of foreign States, their Governments and rulers are founded, and which lie behind the decisions in those cases which have been referred to in Part I of this Memorandum.

The present practice of the Inland Revenue Department of the United Kingdom is founded on the view that the public property of a foreign State is protected from taxation under the United Kingdom Income Tax Acts by the general principle of international law which treats sovereigns and the public property belonging to them as not subject to the municipal laws of foreign States.

It has already been seen that English law does not regard the use of the property of a foreign State for trading purposes as depriving such property from immunity from arrest and the process of the courts. The same principle has been followed in practice by the Board of Inland Revenue which has stated that the Government of a foreign country is not charged to Inland Revenue direct taxation either in respect of property which it owns or profits of trade which it carries on in the United Kingdom. This is so even where the trade of a foreign Government is carried on by an agent in the United Kingdom. For example, in 1936 the U.S.S.R. Trade Delegation was exempted from taxation on its trade profits. Such practice is consistent with the doctrine of absolute immunity of foreign sovereigns which has so far been upheld in the United Kingdom, and which makes no distinction between public and private law activities of States. As has been seen from the case of The Cristina cited above, this doctrine has not escaped some criticism in the English Courts, and doubts as to the desirability of exempting from the taxing laws of other countries the commercial activities of a foreign State have been expressed in the United Kingdom within the last thirty years. It remains however, to be seen whether the Courts and authorities of the United Kingdom will, at any time in the future, make a distinction between the "public" and "private" activities of a foreign State, and withhold both jurisdictional immunity and immunity from taxation from the latter. To a large extent this will be dependent on the report of the inter-departmental Committee which is referred to in Part III of this Memorandum, and on any legislation which might be introduced as the result of such report.

III Inquiry/

III. Enquiry into questions of State immunity

During a debate in the House of Lords on 23rd November 1949 (37) on the Tass Agency case which has been referred to in Part I of this Memorandum, the Lord Chancellor announced that the Government had decided to set up an inter-departmental Committee to consider and report on the question of "whether the law of this country afforded to organs of foreign States a wider immunity than was desirable or strictly required by the principles of international law observed by the countries of the world.", a question the importance of which the Lord Chancellor said had increased "owing to the general increase of State activities at the present day and their extension into the realm of commerce and trade."

The Lord Chancellor stated that after the report of the Committee had been received and considered, it might be decided that there would have to be new legislation to alter "the principle of State immunity".

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(37) Reported in "The Times" 24th November, 1949